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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

70-285

No. ~~1830~~

ALPHA CHI OMEGA, ET AL,
Petitioners,

vs.

JOHN C. RADER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

(Names and addresses of Counsel appear at the end of the petition.)

TWENTIETH CENTURY PRESS, INC., CHICAGO 60606

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NO.

ALPHA CHI OMEGA, ET AL,
Petitioners,

VS.

JOHN C. RADER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Alpha Chi Omega, et al, Petitioners,[1] respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this action on March 22, 1971.

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1. Petitioners, defendants-appellees in the court below, are the following college social fraternities and sororities: Alpha Chi Omega; Alpha Gamma Delta; Alpha Omicron Pi; Alpha Phi International Fraternity, Inc.; Alpha Tau Omega Fraternity; Delta Gamma; Delta Tau Delta Fraternity; Delta Zeta, Gamma Phi Beta Sorority, Inc.; Kappa Alpha Theta Fraternity, Inc.; Phi Epsilon Pi Fraternity; Phi Gamma Delta; Sigma Alpha Epsilon; Sigma Nu Fraternity; Zeta Tau Alpha Sorority; Alpha Delta Phi; Alpha Chi Sigma; Delta Upsilon; Phi Kappa Sigma; Zeta Psi Fraternity of North America; Acacia Fraternity; Pi Kappa Alpha; and Phi Kappa Psi.

OPINION BELOW

The opinion of the Court of Appeals, not officially reported, appears in the Appendix[2] hereto at p. A-1. The opinion of the District Court, not officially reported, appears in the Appendix hereto at p. A-9.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on March 22, 1971. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

The question presented in this case is whether a proceeding by the Federal Trade Commission pursuant to Section 5 of the Federal Trade Commission Act (15 U.S.C. § 45) to prevent unfair methods of competition in commerce if directed at alleged conduct which appears to involve an existing or incipient violation of the antitrust laws is a "proceeding to prevent, restrain, or punish violations of any of the antitrust laws" within the meaning of Section 5(b) of the Clayton Act (15 U.S.C. § 16(b)) having the effect of suspending the running of the statute of limitations in respect of a private right of action for treble damages under the antitrust laws.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved in this case, which appear in full text in the Appendix hereto at p. A-17, are Section 5(b) of the Clayton Act (15 U.S.C. § 16(b); Sections 5(a)(1) and (b) of the Federal Trade Commission Act (15 U.S.C. § 45(a)(1) and (b)) and Section 1 of the Clayton Act (15 U.S.C. § 12).

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2. The Appendix to this petition is hereinafter referred to as "App." The Plaintiff-Appellants' appendix as printed for the use of the Court below is hereinafter referred to as "P.A."

STATEMENT OF THE CASE

A. Nature of Case, Course of Proceedings and Disposition Below.

Respondent John C. Rader commenced this action in the United States District Court for the Northern District of Illinois on June 28, 1967 seeking treble damages pursuant to Section 4 of the Clayton Act, 15 U.S.C. § 15, for injuries claimed to have been caused by alleged violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2. Named as defendants were L. G. Balfour Company, three corporations owned by Balfour interests and 152 college fraternities and sororities, including the Petitioners herein. (P.A. 7-25). Motions to dismiss and for summary judgment were filed by Petitioners based upon the defense of the statute of limitations contained in Section 4B of the Clayton Act, 15 U.S.C. 15(b). In opposition to the motion Plaintiff Rader contended that the running of the statute of limitations had been tolled or suspended by virtue of Section 5(b) of the Clayton Act, 15 U.S.C. § 16(b), because of the pendency of a proceeding by the Federal Trade Commission (the "FTC") under Section 5 of the FTC Act, 15 U.S.C. § 45, to restrain alleged unfair methods of competition. The antecedent FTC proceeding was brought against L. G. Balfour Company, Lloyd G. Balfour and Burr, Patterson and Auld Company. The fraternities and sororities named as defendants in Rader's complaint were not parties to the FTC proceeding.

The District Court on September 16, 1968, entered judgment dismissing the complaint holding that the running of the statute of limitations had not been suspended by the FTC proceeding to enforce Section 5 of the FTC Act since that section is not one of the antitrust laws as defined in Section 1 of the Clayton Act, 15 U.S.C. § 12, (App. A-9).

Rader appealed and on March 22, 1971 the Court of Appeals for the Seventh Circuit reversed the judgment of the District Court and remanded the cause for further proceeding. The opinion of the Court of Appeals was based upon a holding that an FTC proceeding to restrain unfair competition under Section 5 of the FTC Act, 15 U.S.C. § 45, serves to suspend the statute of limitations pursuant to Section 5(b) of the Clayton Act, U.S.C. § 16(b), if the FTC proceeding "is directed at alleged conduct which appears to involve an existing or incipient violation of the antitrust laws." (App. A-1).

REASONS FOR GRANTING THE WRIT

Whether a proceeding by the FTC pursuant to Section 5 of the FTC Act, 15 U.S.C. § 45, to restrain unfair competitive practices qualifies as a proceeding "to prevent, restrain or punish violations of any of the antitrust laws" within the meaning of Section 5(b) of the Clayton Act, 15 U.S.C. § 16(b), serving to suspend the statute of limitations applicable to private antitrust treble damage actions is an important question of federal antitrust law which has not been and is in urgent need of being resolved and settled by this Court. We shall show that a conflict exists among the opinions of the courts which have considered the question and that the Court of Appeals erred in its construction of the statutory provisions involved and in basing its decision upon an unwarranted extension of the holding of this Court in *Minnesota Mining* v. *N. J. Wood Co.*, (1965) 381 U.S. 311, hereinafter referred to as the 3M case.

Section 5(b) of the Clayton Act, 15 U.S.C. § 16(b), provides in pertinent part that "Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws . . . the running of the statute of limitations in respect of

every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter . . ."

The antecedent FTC case, which the Court of Appeals held triggered suspension of the statute of limitations pursuant to Section 5(b) of the Clayton Act, was a proceeding under Section 5 of the FTC Act, 15 U.S.C. § 45, to prevent and restrain the Balfour defendants from engaging in unfair methods of competition prohibited by Section 5. The FTC complaint alleged sixteen "unfair" practices on the part of the Balfour defendants in the conduct of their business of manufacturing and selling Greek-letter fraternity and sorority jewelry and insignia items and other products. No charge was made that any of the specified practices violated the antitrust laws but, rather, the same were alleged to constitute "unfair methods of competition and unfair acts and practices, in commerce" violative of Section 5 of the FTC Act. (P.A. 102-111).

The term "antitrust laws" used in Section 5(b) of the Clayton Act is defined in Section 1 of the same Act, 15 U.S.C. § 12. Concededly Section 5 of the FTC Act is not an antitrust law within the Clayton Act definition which is exclusive. *Nashville Milk Co.* v. *Carnation Co.*, 355 U.S. 373, 376. Consequently a proceeding pursuant to Section 5 of the FTC Act to restrain unfair competitive practices violative thereof is a proceeding to "prevent, restrain and punish violations" of a statutory provision which is not one of the "antitrust laws." That FTC proceedings to restrain unfair competitive practices under Section 5 of the FTC Act do not meet the requirements of Section 5(b) of the Clayton Act was squarely held in *Laitrum* v. *Deepsouth Packing Co.*, 279 F. Supp. 883 (E.D. La. 1968). See also, *Y & Y Popcorn Supply Co.* v. *ABC Vending Corp.*, 263 F. Supp. 709 (E.D. Pa. 1967).

The Court of Appeals below, however, chose not to follow *Laitrum* and instead relied upon a contrary holding in *Lippas, Inc.* v. *Lenox Incorporated,* 305 F. Supp. 182 (D. Vt. 1969). Additionally the Court of Appeals in support of its decision cited this Court's opinion in the 3M case, (1965) 381 U.S. 311.

Reliance by the Court of Appeals on the 3M decision was misplaced. That case did not in any way touch upon or determine whether a proceeding for violation of Section 5 of the FTC Act is or can be a proceeding to enforce the "antitrust laws" so as to bring into play the tolling provisions of Section 5(b) of the Clayton Act. In 3M the antecedent FTC proceeding had not been instituted to enforce Section 5 of the FTC Act but had been brought pursuant to authority vested in the FTC by Section 11 of the Clayton Act (15 U.S.C. § 21) to restrain a violation of Section 7 of the Clayton Act relating to corporate acquisitions and mergers. Thus the FTC case being based upon the Clayton Act was clearly a proceeding to enforce the "antitrust laws." The point at issue in 3M was whether the FTC proceeding was a "civil or criminal proceeding brought by the United States" as required by Section 5(b). This Court held that the FTC case was a proceeding by the United States within the meaning of Section 5(b) but no interpretation of what constitutes a proceeding to enforce the "antitrust laws" was involved, considered, discussed or decided. Thus it is clear that 3M did not determine the issue presented by the case at bar.

In its opinion the Court of Appeals pointed out that the FTC may issue cease and desist orders against conduct deemed to constitute unfair competition prohibited by Section 5 of the FTC Act and which conduct may also constitute a violation of the Sherman Act or other antitrust laws. (App. A-3). But the fact that a partial "overlap" may exist

between the coverage of conduct violative of both Section 5 of the FTC Act and the antitrust laws does not serve to change the basic nature of a Section 5 FTC case from a proceeding for enforcement of a statutory provision other than one of the "antitrust laws." In a cognate situation a similar "overlap" suggestion was considered and rejected by this Court in *Nashville Milk Co.* v. *Carnation Co.*, 355 U.S. 373, 378 (1958).

This Court has made clear that the ambit of conduct proscribed by Section 5 of the FTC Act is much greater than that covered by the antitrust laws:

> ". . . although all conduct violative of the Sherman Act may likewise come within the unfair trade practice prohibitions of the Trade Commission Act, the converse is not necessarily true. It has long been recognized that there are many unfair methods of competition that do not assume the proportions of Sherman Act violations. *Federal Trade Comm'n* v. *R. F. Keppel & Bro.*, 291 U.S. 304; *Federal Trade Comm'n* v. *Gratz*, 253 U.S. 421, 427. Hence a conclusion that respondents' conduct constituted an unfair method of competition does not necessarily mean that their same activities would also be found to violate § 1 of the Sherman Act." (*FTC* v. *Cement Institute*, 333 U.S. 683 at 694 (1948).)

Conduct which has not "assumed the proportions of antitrust violations" but which is merely contrary to the "policy" of the antitrust laws may be prohibited by cease and desist order under Section 5 of the FTC Act. *Atlantic Refining Company* v. *FTC*, 381 U.S. 357 at 369 (1965); *FTC* v. *Brown Shoe*, 384 U.S. 316 (1966). But Section 5(b) of the Clayton Act is unambiguous in limiting its tolling effect on the statute of limitations to proceedings involving "violations" of the antitrust laws.

The Court of Appeals indicated in its opinion that the FTC complaint and the treble damage complaint should be compared and that the statute of limitations is suspended by virtue of Section 5(b) of the Clayton Act if the FTC complaint is "directed at conduct which appears to involve an existing or incipient violation of the antitrust laws." Thus, under the Court of Appeals ruling, any allegations in the FTC complaint which "appear" to cover conduct which constitutes incipient or actual antitrust violations serve to suspend the statute of limitations even though the FTC, to establish its charges, need prove only conduct violative of the "policy" of the antitrust laws but which has not and may never assume the proportions of actual antitrust violations. We submit that this holding by the Court of Appeals cannot be squared with the explicit language of Section 5(b) of the Clayton Act.

The decision below constitutes an erroneous interpretation and construction of statutory provisions of great significance in antitrust law. The importance of the question in the administration of the antitrust laws and the trial of cases at the district court level is such that the same should be resolved by this Court at this time rather than putting Petitioners and similarly situated treble damage case defendants to the expense of engaging in protracted antitrust litigation which would be avoided should this Court agree with Petitioners that the holding below is erroneous.

For the foregoing reasons, the writ should be granted.

Respectfully submitted,

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APPENDIX

Opinion of the Court of Appeals

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1968 — APRIL SESSION, 1969

No. 17299

JOHN C. RADER,
Plaintiff-Appellant,

v.

LLOYD G. BALFOUR, et al.,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

MARCH 22, 1971

Before DUFFY, *Senior Circuit Judge,* FAIRCHILD, *Circuit Judge,* BEAMER, *District Judge.*[1]

FAIRCHILD, *Circuit Judge.* Plaintiff brought a private treble damage antitrust action. He allleged violations of §§ 1 and 2 of the Sherman act.[2] Concededly the action is barred by the four year statute of limitations[3] unless the running of the statute was suspended by either (1) the operation of 15 U.S.C. § 16(b), triggered by the institution

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1. Judge Beamer is sitting by designation from the United States District Court for the Northern District of Indiana.
2. 15 U.S.C. §§ 1 and 2.
3. 15 U.S.C. § 15(b).

of a Federal Trade Commission proceeding, or (2) fraudulent concealment of the alleged conspiracy. The district court decided the statute was not tolled on either ground and entered judgment for defendants. Plaintiff appealed. We reverse on ground (1).

Plaintiff sold his company September 14, 1961, and his asserted cause of action had accrued by that date. The FTC proceeding against some of the defendants was begun June 16, 1961 and was still pending in 1967 when plaintiff filed his complaint.

15 U.S.C. § 16(b) provides: "Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, . . . the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter . . ."

A question which readily comes to mind is whether an administrative proceeding before the FTC can fall within the meaning of a "civil or criminal proceeding . . . instituted by the United States." The Supreme Court answered that question in the affirmative in *Minnesota Mining* v. *N. J. Wood Co.*[4] It deemed the administrative character of the FTC proceeding immaterial and held that in order to effectuate congressional purposes § 16(b) should be construed so that the FTC proceeding tolled the statute of limitations.

The FTC proceeding considered in *Minnesota Mining* was brought under the authority of 15 U.S.C. § 21, a portion of the Clayton act, to compel divestiture of a corporate acquisition forbidden by 15 U.S.C. § 18, also part of the Clayton act. Since the Clayton act is one of the "antitrust

4. (1965), 381 U.S. 311.

laws" enumerated in 15 U.S.C. § 12, it was clear that the FTC proceeding in *Minnesota Mining* was authorized by an antitrust law for the purpose of dealing with a violation thereof. The critical question of construction was whether its administrative rather than judicial character prevented its being deemed the type of proceeding described by § 16(b). In the present case, however, the FTC proceeding was brought by authority of 15 U.S.C. § 45, a part of the Federal Trade Commission act. § 45 declares that unfair methods of competition and unfair or deceptive acts or practices in commerce are unlawful, and it authorizes commission proceedings leading to cease and desist orders. The FTC act is not one of the antitrust laws enumerated by 15 U.S.C. § 12, and conduct which is declared unlawful by § 45, and proceeded against by the FTC under authority of that section, need not be a violation of an antitrust law.

The FTC, however, may properly and often does proceed under § 45 to issue a cease and desist order against conduct which it deems an unfair method of competition and which in fact is also a violation of the Sherman act or other antitrust law.[5]

The Supreme Court has said that "on the whole the [F.T.C.] Act's legislative history shows a strong congressional purpose not only to continue enforcement of the Sherman Act by the Department of Justice and the federal district courts but also to supplement that enforcement through the administrative process of the new Trade Commission."[6]

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5. *Federal Trade Com.* v. *Cement Institute* (1948), 333 U.S. 683; *Federal Trade Com.* v. *Motion Picture Adv. Co.* (1953), 344 U.S. 392, 393-4; *Times-Picayune Pub. Co.* v. *United States* (1953), 345 U.S. 594, 609.

6. *Cement Institute, supra,* 333 U.S. 683, 692.

The FTC may in a § 45 proceeding, complain of conduct which either involves an existing violation of an antitrust law or threatens to ripen into such violation without, in explicit terms, asserting that the conduct amounts to or threatens such violation. The Supreme Court has declared:

> "It is . . . clear that the Federal Trade Commission Act was designed to supplement and bolster the Sherman Act and the Clayton Act . . . to stop in their incipiency acts and practices which, when full blown, would violate those Acts . . . as well as to condemn as 'unfair methods of competition' existing violation of them."[7]

The question of construction presented in this case is whether an FTC proceeding under the authority of 15 U.S.C. § 45, if directed at stopping alleged conduct which appears to involve either an existing or incipient violation of the antitrust laws is, like an FTC proceeding under the authority of the antitrust laws, a proceeding "to prevent, restrain, or punish violations of any of the antitrust laws" under 15 U.S.C. § 16(b).

The district court adopted the view that an FTC proceeding brought under § 45 does not qualify. *Laitram Corporation* v. *Deepsouth Packing Company* (E.D. La., 1968), 279 FSupp 883, adopted the same view. More recently the broader construction was accepted in *Lippa's Inc.* v. *Lenox, Incorporated* (D.Vt., 1969), 305 FSupp. 182. The district court observed that when *Minnesota Mining* was decided by the third circuit, the opinion[8] pointed out a

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7. *F.T.C.* v. *Motion Picture Adv. Co.* (1953), 344 U.S. 392, 394, quoted and relied on in *F. T. C.* v. *Brown Shoe Co.* (1966), 384 U.S. 316, 322.

8. *New Jersey Wood Finishing Co.* v. *Minnesota Min. & Mfg. Co.* (3rd Cir., 1964), 332 F2d 346.

distinction between the role of the FTC in proceedings against unfair methods of competition under 15 U.S.C. § 45 and its role in a proceeding authorized by 15 U.S.C. § 21, part of the Clayton act, then before the court. In part the third circuit was concerned with the argument that § 16(b) must be construed so as to relate only to the proceedings to which §16(a) (use as prima facie evidence of decree in proceeding brought "under" the antitrust laws) could be applied, and may well have held the opinion that a proceeding "under" § 21 could be fitted into § 16(a) and a proceeding "under" § 45 could not.

The Supreme Court, however, in affirming, made no reference to any distinction between an FTC proceeding under § 21 and a proceeding under § 45, stated the question as "whether proceedings by the Federal Trade Commission toll the running of the 48 [15 U.S.C. § 15b] statute of limitations to the same extent as to judicial proceedings", and held that in construing § 16(b) as applying to commission proceedings it is immaterial whether or not § 16(a) applies to them.

In construing § 16(b), the Supreme Court found little help in legislative history and relied entirely on policy factors deemed to have been favored by Congress. The Court indicated the substantial advantages a private suitor may derive from observing the development and presentation of government proof of an antitrust violation before being required to begin or forego his own action. It noted that "Congress has expressed its belief that private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws." It chose the inclusive construction because "congressional policy sustaining § 5 (b) [15 U.S.C. § 16(b)] would be effectively served only by tolling the statute of limitations in cases such as this. . . ."

Although a supportable distinction could be drawn between an FTC proceeding authorized by the antitrust laws to deal with violations thereof and an FTC proceeding for a cease and desist order aimed against alleged conduct which involves either an existing or incipient violation of the antitrust laws, but brought under a provision of the FTC act authorizing proceedings against a broader range of conduct, we conclude that the policy factors deemed controlling in *Minnesota Mining* are present and controlling here as well. Therefore we construe 15 U.S.C. § 16(b) so that an FTC proceeding brought under 15 U.S.C. § 45 suspends the running of the statute of limitations if the proceedings is directed at alleged conduct which appears to involve an existing or incipient violation of the antitrust laws.

The question whether a particular FTC or other government proceeding tolls the statute with respect to a priviate claim asserted in a civil action is to be resolved, in general, by a comparison of the two complaints. The test is whether the private action is based in part on matters of which the government complained.[9]

The defendants in the civil action include the so-called Balfour defendants (L. G. Balfour Company, its principal officer, and two subsidiaries) and the so-called fraternity defendants (152 college fraternities and sororities). Plaintiff's company was engaged in manufacturing and dealing in a line of insignia goods, items of interest to fraternities and sororities and their members. Briefly summarizing the complaint, plaintiff alleges that the Balfour defendants are engaged in the same business; that they conspired among themselves and with the fraternity defendants in order to limit the production and distribution of insignia

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9. *Leh* v. *General Petroleum Corp.* (1965), 382 U.S. 54, 64, 65.

goods, control prices, eliminate competition, and obtain a monopoly. Plaintiff avers that this activity forced him to sell his company at a depressed price.

The respondents in the 1961 FTC proceeding were the same as the Balfour defendants in this action, except for one subsidiary. The business involved was the same. The FTC complaint set out 16 allegedly unfair methods of competition, acts, and practices. Several alleged restraints upon competition in insignia goods; several alleged attempts to monopolize and successful monopolization; several alleged agreements and understandings with fraternities and sororities and others for exclusive dealing and payment of royalties to the organizations on insignia goods purchased from respondents; several alleged other practices with an obvious tendency to put competitors at a disadvantage. The complaint alleged that these acts and practices had the tendency to restrain and eliminate competition and have resulted in monopoly. Thus, although the complaint did not assert, as it need not, that §§ 1 and 2 of the Sherman act had been violated, it expressly asserted monopolization and at least implied that the agreements between respondents and the organizations restrained trade.

We think the FTC proceeding may fairly be said to be one "to prevent" if not "to restrain or punish" violations of the Sherman act. It further appears clear that the right of action plaintiff asserts in the treble damage action is "based in whole or in part on . . . matter complained of" in the FTC proceedings. It follows that the statute of limitations was tolled.

When this case was submitted, the fraternity defendants, who had not been parties to the FTC proceeding, argued that the statute was not tolled as to them. They relied on the 1954 decision of this court in *Sun Theatre Corp.* v.

RKO Radio Pictures.[10] The Supreme Court, however, has recently disapproved *Sun Theatre* and held "that § 16(b) tolls the statute of limitations against all participants in a conspiracy which is the object of a government suit, whether or not they are named as defendants or conspirators therein; indeed, to so hold materially furthers congressional policy by permitting private litigants to await the outcome of government suits and use the benefits accruing therefrom."[11]

The judgment is reversed and the cause remanded for further proceedings, except that as to the parties named in our order dated November 7, 1969[12] judgment shall be entered as directed in that order.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

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10. (7th Cir., 1954), 213 F.2d 284, 290-2.

11. *Zenith Radio Corporation* v. *Hazeltine Research, Inc.*, decided February 24, 1971, 39 L.W. 4250, 4255.

12. Plaintiff and certain defendants have agreed to dismissal of the action as to these defendants. On November 7, 1969 we entered an order reflecting their agreement.

Opinion of the District Court

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JOHN C. RADER,
Plaintiff,
vs.
LLOYD G. BALFOUR, *et al.*,
Defendants.

Civil Action
No. 67 C 1118

MEMORANDUM OPINION

(Filed Sep 16 1968)

Plaintiff John C. Rader filed this action on June 28, 1967, seeking treble damages, pursuant to section 4 of the Clayton Act (15 U.S.C.A. § 15), for injuries alleged to have been caused by alleged violations by defendants of sections 1 and 2 of the Sherman Act (15 U.S.C.A. §§ 1 and 2). Named as defendants herein are Lloyd G. Balfour, 3 corporations owned or controlled by Balfour interests, and 152 college fraternities and sororities. Plaintiff alleges that the Balfour companies, which are engaged in the business of manufacturing, distributing and selling insignia goods[1] in interstate commerce, have conspired among themselves and with the fraternity defendants, in order to limit and control the

1. Plaintiff defined the term "insignia goods" as follows: "the distinctive rings, badges, keys, pins, buttons, seals, emblems, and plaques and other miscellaneous items which all bear distinctive insignia, device, name, crest, emblem or initial, including but not limited to such items as wearing apparel, decorative items, ceramics, paper products, glasswork, wooden plastic products and other sundry items of personal property, all of which or some of which are used by fraternities and sororities.

manufacture, distribution, and sale of insignia goods in Interstate Commerce; to regulate, control and increase the prices charged the public for insignia goods; to prescribe, regulate and control the relations between fraternities and manufacturers, distributors and vendors of insignia goods; to oppress and discriminate against smaller independent persons in the insignia goods business, such as plaintiff; to impose unreasonable restrictions upon the trade and business of the independents; and to substantially eliminate competition from the independents, including plaintiff, and to obtain a monopoly of the insignia goods business for the Balfour defendants. As a result, plaintiff alleges that he was forced to sell the business he operated from 1941 until September 1961, under the name Old Hickory Paddle Company, at a price far less than if he had been able to engage in the insignia goods business in a free and open market.

Several defendants have raised the defense of statute of limitations, either in their answers or by way of motion. The statute of limitations applicable to anti-trust actions is section 4B of the Clayton Act, 15 U.S.C. § 15(b), which provides,

> Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued.

Since plaintiff went out of business in September of 1961, and this action was not filed until June of 1967, it is contended that the four year statute of limitations constitutes a bar to this action.

Plaintiff admits that the applicable period is four years, but contends that because the conspiracy has been fraudulently concealed, and because plaintiff allegedly did not learn of the conspiracy until March 27, 1967, that the statute of limitations does not bar his action. In the alternative

plaintiff contends that the statute of limitations has been suspended since June 16, 1961, the date certain Federal Trade Commission proceedings against the Balfour defendants began.

On June 16, 1961, the Federal Trade Commission brought an administrative action pursuant to Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, against L. G. Balfour Company, Lloyd G. Balfour and Burr, Patterson & Auld Company, Docket 8435, charging these respondents with certain acts and practices having the tendency and capacity unlawfully to restrain, lessen, and eliminate competition and to create a monopoly in the manufacture, sale, and distribution of college and class rings and commercial jewelry, in commerce; with unlawfully restraining, lessening, and eliminating competition and creating a monopoly in the sale and distribution of "official" miscellaneous equipment bought by members of the national Greek-letter social fraternities and sororities, in commerce; with monopolizing the manufacture, sale, and distribution of fraternity insignia jewelry; and with monopolizing the sale and distribution of a full line of insignia-bearing products, particularly the jewelry and "official" miscellaneous equipment purchased by members of the national Greek-letter social fraternities and sororities, in commerce, within the meaning of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

For the reasons which follow, this Court is of the opinion that plaintiff has not sufficiently shown that a genuine issue of material fact exists on the issue of fraudulent concealment; and that the proceedings before the Federal Trade Commission did not suspend the running of the applicable statute of limitations.

Although fraudulent concealment of alleged antitrust violations will suspend the running of the statute of Limita-

tions, Allis-Chalmers v. Commonwealth Edison Co., 315 F.2d 558 (7th Cir., 1963), tolling of the statute is not suspended where it is established that plaintiff knew, or in the exercise of ordinary diligence, should have known of the alleged violation within the statutory period. Where lack of due diligence by plaintiff in pursuing his claim is clearly shown on a motion for summary judgment, entry of summary judgment on the issue of statute of limitations is appropriate, notwithstanding the allegations of fraudulent concealment. Starview Outdoor Theater, Inc. v. Paramount Film Distributing Corp., 254 F. Supp. 855 (N.D. Ill. 1966).

The record on the pending motion for summary judgment, which includes plaintiff Rader's sworn testimony before the Federal Trade Commission on October 26, 1961, and his deposition taken in this action, shows positively that he had knowledge of sufficient facts more than four years prior to the filing of this suit, to put him on notice of his alleged claim, thereby giving rise to a duty of due diligence in its pursuit; and that plaintiff did not exercise due diligence.

Plaintiff's 1961 testimony before the Federal Trade Commission shows conclusively that at that time he was aware of those so-called "official jeweler contracts" between the Balfour companies and the fraternities; and that the existence of these exclusive dealing arrangements between the fraternities and the Balfour companies made it impossible for plaintiff or other independent insignia goods firms to sell to the fraternities. Plaintiff testified to several instances where price cutting tactics had been used to drive him out of the market. He testified to instances where his salesmen and he himself had not been permitted to display their merchandise in individual fraternity houses.

At his deposition, plaintiff specifically admitted that he knew, in 1961, that the Federal Trade Commission was investigating the Balfour monopoly:

Q. So you didn't know what you were going to testify about when you came to Chicago this morning?

A. I knew this, that it was an examination of the Balfour Company, and the monopoly the Balfour Company were supposed to have.

Elsewhere, plaintiff referred to "the situation that I felt the FTC was examining, which was whether or not the Balfour Company was setting up a monopoly to restrain trade." Plaintiff also testified at this deposition,

> Well, I was pretty much annoyed with the L. G. Balfour Company. And, I believed they had damaged me, and I had brought documents setting forth that I had been damaged. Not that I expected any relief, but just because I felt that way. (emphasis added.)

In his deposition, plaintiff Rader further testified to his knowledge of circumstances connecting the fraternities with the alleged antitrust violations. He testified that he had received several letters from the various fraternities, saying that their individual "coat of arms" were "patented," and not to be used without their "okay." He testified that he was "stopped" from selling Christmas cards to the fraternities who said they had official contracts with Balfour. Plaintiff's knowledge of participation of the fraternities in the alleged conspiracy is further revealed in his deposition testimony that in 1961 he tried to dissuade eventual purchasers of his company, the Old Hickory Paddle Company, from making the purchase:

> Q. What was one of the reasons you gave them as to why it wasn't a good buy?
>
> A. The pressures from the contracted monopoly between the fraternities and two or three suppliers made it a rough business and it was too hard to make a profit in it.

Finally, plaintiff's lack of diligence in pursuing his claim is shown by his deposition testimony that after testifying before the Federal Trade Commission, plaintiff did nothing further until March of 1967, when he "came across" a file containing documents he had presented to the FTC back in 1961, along with the business card of his attorney, whom he had met during the FTC hearings back in 1961. Not until plaintiff was about to throw out these materials in 1967, did he finally decide to follow up and call this attorney. Thus plaintiff's decision to finally follow up his claim came over 5 years after he originally had access to the information sufficient to place upon him the duty of diligence.

Plaintiff's conclusory affidavit filed in opposition to the motion for summary judgment, which states "That prior to on or about January 2, 1967, he had no personal knowledge of the particular relationships or facts as alleged in his complaint in the above described action, which alleges a conspiracy mong the defendants", is insufficient to raise a genuine issue of fact for trial. It does not contradict the admissions of plaintiff in his FTC Testimony and his deposition here, which show that he had knowledge of sufficient facts to place upon him a duty of exercising due diligence to make his own inquiry into the facts, and to diligently pursue his claim. The duty of exercising diligence in pursuit of a claim does not arise only after knowledge of every particular circumstance involved in the claim.

It is clear from the record that plaintiff slept on his rights. Accordingly, this Court holds that the running of the Statute of Limitations was not suspended by defendants' alleged attempts to fraudulent concealment of their alleged antitrust violations.

Plaintiff's alternate contention is that the running of the Statute of Limitations was suspended under section 5(b) of the Clayton Act, 15 U.S.C. § 16(b), which provides,

> Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws . . . the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter.

Defendant contends that Section 5(b) does not suspend the running of the Statute of Limitations here, since the Federal Trade Commission proceeding was a proceeding to enforce Section 5 of the Federal Trade Commission Act, not a proceeding to enforce one of the "antitrust laws." The meaning of the term "antitrust laws" was not left to judicial interpretation, but was defined by Congress in Section 1 of the Clayton Act, 15 U.S.C. § 12. The Federal Trade Commission Act is not one of the laws specified in Section 1.

The Supreme Court in Nashville Milk Co. v. Carnation Co., 355 U.S. 373 (1958) ruled that the definition in Section 1 is "exclusive," thus preventing expansive judicial interpretation of the term as applicable to other laws, such as the Robinson Patman Act, which may be colloquially referred to as "antitrust" statutes.

It is clear from an examination of the complaint filed before the Federal Trade Commission against the Balfour defendants, that the Federal Trade Commission was not bringing its action under one of the anti-trust laws, such as the Sherman or Clayton Acts, but was proceeding exclusively under Section 5 of the Federal Trade Commission Act. It is this circumstance which distinguishes Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co., 381 U.S. 311 (1965) (hereinafter referred to as "3M"). In that case the Supreme Court held that a prior FTC proceeding had suspended the running

of the Statute of Limitations as to a private antitrust suitor. However, the FTC in that case was seeking to enforce Section 7 of the Clayton Act. The Court found that suspension under Section 5(b) should not turn on whether it was the justice department or the Federal Trade Commission which was seeking to enforce an antitrust law. In the case at bar, on the other hand, the FTC proceeding was not one to enforce an "antitrust law" as that term is specifically defined in Section 1 of the Clayton Act; the FTC proceeding was an administrative proceeding dealing with a much broader category of regulation than what is forbidden in the "antitrust laws."

This Court accordingly recognizes the distinction made by the Court below in 3M, between an FTC proceeding brought to enforce some provision of the "antitrust laws", and an FTC proceeding brought to enforce only the Federal Trade Commission Act. See New Jersey Wood Finishing Co. v. Minnesota Mining & Manufacturing Co., 332 F.2d 346 (1964). I hold that a Federal Trade Commission proceeding brought solely to enforce the Federal Trade Commission Act will not suspend the running of the Statute of Limitations, under 15 U.S.C. § 16(b); and that all defendants here are accordingly entitled to entry of judgment in their favor.[2]

Enter:

/s/ Alexander J. Napoli
United States District Judge

Dated: September 16th, 1968

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2. Because the Court has concluded that the Federal Trade Commission Docket 8435 was not a proceeding to enforce the anti-trust laws, it will be unnecessary to consider the fraternity defendants' alternative contention, that Section 5(b) of the Clayton Act could not possibly suspend the running of the Statute of Limitations as to them, since they were not named either as respondents or as co-conspirators in the FTC action.

STATUTORY PROVISIONS INVOLVED

Section 5(b) of the Clayton Act (15 U.S.C. § 16(b)):

(b) Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 15a of this title, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however,* That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued. Oct. 15, 1914, c. 323, § 5, 38 Stat. 731; July 7, 1955, c. 283, § 2, 69 Stat. 283.

Section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. § 45(a)(1)):

(a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.

Section 5(b) of the Federal Trade Commission Act (15 U.S.C. § 45(b)):

(b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue

and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by sections 41-46 and 47-58 of this title, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen

and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require: *Provided, however,* That the said person, partnership, or corporation may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section.

Section 1 of the Clayton Act (15 U.S.C. § 12):

"Antitrust laws," as used herein, includes the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety; sections seventy-three to seventy-seven, inclusive, of an Act entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," of August twenty-seventh, eighteen hundred and ninety-four; an Act entitled "An Act to amend sections seventy-three and seventy-six of the Act of August twenty-seventh, eighteen hundred and ninety-four, entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes,'" approved February twelfth, nineteen hundred and thirteen; and also this Act.

"Commerce," as used herein, means trade or commerce among the several States and with foreign nations, or between the District of Columbia or any Territory of the United States and any State, Territory, or foreign nation, or between any insular possessions or other places under the jurisdiction of the United States, or between any such possession or place and any State or Territory of the United States or the District of Columbia or any foreign nation,

or within the District of Columbia or any Territory or any insular possession or other place under the jurisdiction of the United States: *Provided,* That nothing in this Act contained shall apply to the Philippine Islands.

The word "person" or "persons" wherever used in this Act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country. Oct. 15, 1914, c. 323, § 1, 38 Stat. 730.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-285

ALPHA CHI OMEGA, ET AL., *Petitioners,*

v.

JOHN C. RADER, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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October 22, 1971

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent files this brief in response to the Court's request that he do so.

Briefly stated, it is respondent's position that the petition presents no question warranting review by this Court. The decision of the Seventh Circuit is eminently correct and is not alleged to be in conflict with any decision of this Court or of any sister Circuit. And the actual question presented (Pet. p. 2) is drained of all significance when viewed in light of prior decisions of this Court. More particularly:

I.

The question posed in this case is whether an F.T.C. proceeding brought pursuant to § 5 of the F.T.C. Act qualifies as a proceeding "to prevent, restrain or punish violations of any of the antitrust laws" within the meaning of § 5(b) of the Clayton Act so as to suspend the limitations statute applicable to private antitrust treble damage actions.

Petitioner has presented that question, however, on the mistaken notion that a proceeding under § 5 of the F.T.C. Act concerns not antitrust violations but only "unfair methods of competition and unfair acts and practices" under the F.T.C. Act. Hence, it is said (Pet. p. 5), a proceeding under § 5 of the F.T.C. Act is not one "to prevent, restrain or punish violations of any of the antitrust laws"—which laws do not include § 5 of the F.T.C. Act. That analysis is patently erroneous.

In a long series of opinions, this Court has made it plain that the "unfair methods of competition" language in § 5 of the F.T.C. Act is a broad and flexible phrase that covers many things but "minimally . . . registers violations of the Clayton and Sherman Acts." *Times-Picayune Publishing Co.* v. *United States,* 345 U.S. 594, 609 (1953); *Federal Trade Commission* v. *Keppel & Bro.,* 291 U.S. 304, 310-312 (1934); *Federal Trade Commission* v. *Cement Institute,* 333 U.S. 683, 691-693 (1949); *Federal Trade Commission* v. *Motion Picture Service Co.,* 344 U.S. 392, 394-395 (1952). In other words, as stated in the last cited opinion (344 U.S. at 394-395), § 5 is designed "to stop in their incipiency acts and practices which, when full blown, would violate those [Sherman and Clayton] Acts . . . *as well as to condemn as 'unfair methods of competition' existing violations of them.*" (Emphasis added.)

II.

It necessarily follows that a F.T.C. proceeding under this § 5 is a proceeding "to prevent, restrain or punish violations of any of the antitrust laws," as § 5(b) of the Clayton Act uses that language. The F.T.C. proceeding can encompass much more than antitrust violations but it "minimally" covers such violations. And it is part of the F.T.C.'s duty in such a proceeding to prevent and restrain both incipient and matured antitrust violations. That duty, of course, is shared with the Department of Justice and the federal district courts. *Federal Trade Commission* v. *Cement Institute,* 333 U.S. at 691.

The fact that § 5 of the F.T.C. Act is not itself an antitrust statute and that a § 5 proceeding is thus not instituted "under" an antitrust statute is irrelevant. What is significant is that Congress has authorized the F.T.C. to deal with violations of the Sherman and Clayton Acts in the course of a § 5 proceeding. "The Commission has jurisdiction to declare that conduct to restrain trade is an unfair method of competition even though the self-same conduct may also violate the Sherman Act." *Federal Trade Commission* v. *Cement Institute,* 333 U.S. at 693.

III.

Contrary to petitioner's assertion (Pet. p. 5), the antecedent F.T.C. proceeding in this very instance dealt with alleged violations of the Sherman Act. As indicated in the recent opinion of the Seventh Circuit enforcing in large part the F.T.C. order, the F.T.C. was here concerned with charges of monopolization that were in substance violations of the Sherman Act. *L. G. Balfour Co.* v. *F.T.C.,* 442 F. 2d 1 (7th Cir. 1971). And

the Seventh Circuit premised its review of the F.T.C.'s monopolization findings "on an examination of criteria which constitute an offense under Section 2 of the Sherman Act." 442 F. 2d at 9. The F.T.C. proceeding is a classic example of one brought under § 5 of the F.T.C. Act, with its broad and flexible "unfair methods of competition" standard, that involved *inter alia* preventing and restraining violations of the Sherman Act.

It follows that such a proceeding fully meets the definition set forth in § 5(b) of the Clayton Act. It was a proceeding "to prevent, restrain or punish violations of any of the antitrust laws."

IV.

It need only be added that the asserted conflict between the Seventh Circuit's decision in this case and the decisions of two federal district courts in Louisiana and Pennsylvania (Pet. p. 5) does not qualify as a reason for the grant of certiorari. And the Seventh Circuit's reliance on a contrary decision of a federal district court in Vermont (Pet. p. 6) has no certiorari significance.

The petitioner errs in asserting (Pet. pp. 4, 6) that the Seventh Circuit gave "an unwarranted extension" to the holding of this Court in the 3M case, *Minnesota Mining Co.* v. *N. J. Wood Co.*, 381 U.S. 311 (1965), and that the Seventh Circuit's reliance on the 3M decision was "misplaced." A mere glance at the Seventh Circuit's opinion, now reported at 440 F. 2d 469, reveals that the court was fully cognizant of the narrow point in issue in the 3M decision (see Pet. A-2), which was whether an F.T.C. proceeding under § 5 is a "civil or criminal proceeding . . . instituted by the United States." The Seventh Circuit's reliance on the 3M deci-

sion was only with respect to the broad policy considerations there set forth respecting a liberal interpretation of the tolling provisions of the limitations statute applicable to private antitrust litigation (see Pet. A-5). Such reliance was well placed, not misplaced.

CONCLUSION

Since the decision below is so plainly correct and since no conflict exists with respect to decisions of this Court or of other Circuits, the petition for certiorari should be denied.

Respectfully submitted,

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